Supreme Court, U.S.
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No. 05-1185

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In The
Supreme Court of the United States

ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; ROBERT T. ADCOCK; AND NATHOLYN P. ADCOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a court lack jurisdiction where a federal agency initiates an enforcement action under the Safe Drinking Water Act without satisfying the statutory pre-condition to its right to bring the action – namely, that an appropriate state agency request federal enforcement – where precedent from this Court holds that meeting statutory prerequisites is a necessary condition of subject matter jurisdiction in environmental lawsuits, and at least one other Court of Appeals has reasoned that an agency may *not* ignore an explicit statutory requirement that a particular representative of the state request assistance before the federal agency may act?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Alisal Water Corporation, Toro Water Service, Inc., North Monterey County Water Service, Inc., Moss Landing Water Service, Inc., Robert T. Adcock, and Natholyn P. Adcock were the defendants and appellants in the courts below.

Alisal Water Corporation and Toro Water Service, Inc., are privately held corporations that have no corporate parent and issue no shares to the public. All other corporate defendants are divisions or wholly-owned subsidiaries of Alisal Water Corporation.

The United States of America was the plaintiff and appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion below is reported as *United States v. Alisal Water Corp., et al.*, 431 F.3d 643 (9th Cir. 2005). App. 1-31. The opinions of the district court are reported at 114 F.Supp.2d 927 (N.D. Cal. 2000) and 326 F.Supp.2d 1010 (N.D. Cal. 2002) and appear at App. 114-137 and App. 68-113, respectively. One memorandum decision of the district court relevant to this petition is unreported and appears in the Appendix. App. 62-67.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on October 13, 2005. App. 35. Petitioners timely filed a petition for panel rehearing. The Ninth Circuit amended its opinion and denied the petition for rehearing on December 14, 2005. App. 2. The present petition is timely under 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Safe Drinking Water Act, 42 U.S.C. § 300g-3(b) provides:

> The Administrator [of the Environmental Protection Agency] may bring a civil action in the appropriate United States district court to require

compliance with any applicable requirement with an order issued under subsection (g) of this section, or with any schedule or other requirement imposed pursuant to a variance or exemption granted under section 300g-4 or 300g-5 of this title if –

(1) authorized under paragraph (1) or (2) of subsection (a) of this section, or

(2) if requested by (A) the chief executive officer of the State in which is located the public water system which is not in compliance with such regulation or requirement, or (B) the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations.

The court may enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies; and, if the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $25,000 for each day in which such violation occurs.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

INTRODUCTION

This petition raises a substantial question concerning the District Court's jurisdiction to hear this action. In conflict with Supreme Court precedent and the reasoning of a decision from the Court of Appeals for the District of Columbia, the Court of Appeals for the Ninth Circuit held that the statutory condition for the United States to bring an enforcement action under the Safe Drinking Water Act – that the proper state official request such action – is not jurisdictional. Although Congress imposed this condition to limit federal authority in this area of traditional state regulation and enforcement, the Court of Appeals' holding undermines Congress' scheme to ensure a strong role for state enforcement of the Act. This Court should grant this petition to clarify whether the statutory condition is a jurisdictional prerequisite.

STATEMENT OF FACTS

The Adcock family has owned and operated public water utilities in Monterey County, California, for more than 70 years. Eight of the systems are wholly owned subsidiaries or divisions of Alisal Water Corporation

("Alisal"), and one, Toro Water Service, Inc., is held independently of Alisal. App. 3. Robert T. Adcock and Natholyn P. ("Patricia") Adcock are the principal shareholders of Alisal and Toro. App. 3. In 2001, the Adcocks' water utilities served a total of approximately 28,000 people, with the largest, the Salinas Division, supplying water for about 25,000 people. App 3, n. 1. Each of the systems is regulated by the California Public Utilities Commission. Excerpt of Record ("ER") 4454.

On August 15, 1996, David Spath, Chief of the Division of Drinking Water and Environmental Management in the California Department of Health Services, sent a letter to EPA requesting EPA to bring an enforcement action against Alisal. App. 4. The United States commenced this action in January 1997 against Alisal, two of Alisal's divisions (North Monterey County Water Service, Inc. (a/k/a Normco) and Moss Landing Water Service), Toro, and Alisal's and Toro's owners, the Adcocks (collectively "petitioners"), alleging violations of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.* and its regulations.[1] App. 4.

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[1] The first eight causes of action alleged violations of total coliform regulations on 22 separate occasions between 1991 and 1994, resulting in 193 violations of the Act and its regulations. These violations included failure to comply with maximum contaminant level ("MCL") standard for total coliform, failure to notify the state or county of the MCL exceedances, failure to give public notice of MCL exceedances, failure to do increased and routine monitoring after an MCL exceedance, failure to report the failure to do repeat monitoring, failure to report or falsified test reports of monitoring, failure to sample according to a written sample testing plan, and failure to keep proper records of samples. *See* App. 118, 120. The ninth cause of action alleged 24 violations of monitoring and reporting requirements for lead and copper at several small water systems in 1993 and 1994. *See* App. 118; *see also*

(Continued on following page)

In August 2000, the District Court granted summary judgment against all defendants on the first nine causes of action. *United States v. Alisal Water Corp.*, 114 F.Supp.2d 927, 932-36 (N.D. Cal. 2000) ("*Alisal I*"). App. 114-137. After a trial, the District Court ruled for the government on the tenth cause of action for fraudulent conveyance. App. 4. The Court subsequently granted summary judgment against the corporate defendants (but not the Adcocks) on causes of action 11-13. App. 5.

After holding remedy hearings in December 2001 and January 2002, the Court ordered appointment of a receiver to manage the small water systems and make a recommendation regarding their sale. *United States v. Alisal Water Corp.*, 326 F.Supp.2d 1010 (N.D. Cal. 2002) ("*Alisal II*"); *see* App. 5, 68-113. The Court allowed the Adcocks to continue to manage the Salinas Division (the largest water system), but also required them to implement millions of dollars of improvements. App. 111. The Court subsequently held two "town meetings" in August and December 2003, at which it solicited public comment about possible sales of the small water systems. *See* App. 21-22. On April 13, 2004, the District Court ordered the receiver "to conclude the sales of the systems [to the designated entities] as soon as practicable." *See* App. 5-6.

The government asked the Court to impose a penalty in the range of $3-5 million and urged the Court, if the individual petitioners could not pay the penalty after liquidating all their assets, to order petitioners to

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ER3450-ER3457. The 10th cause of action alleged fraudulent conveyance of assets. App. 118. The 11th through 13th causes of action alleged eight MCL violations for total coliform at three water systems between August 2000 and March 2001. ER743.

purchase a small annuity for their subsistence for their estimated life-expectancy. ER4412-ER4420. On May 20, 2004, the Court assessed a civil penalty in the amount of $500,000, but allowed a credit of $300,000 to take account of the fact that some of the sales were being made to the lowest bidders, rather than to the highest bidders who submitted bids to the receiver. App. 6.

Petitioners raised several issues on appeal, including whether the District Court had jurisdiction over this action. The Ninth Circuit affirmed the District Court judgment in its entirety. Regarding the jurisdictional issue, the Court of Appeals held that the District Court had general federal question jurisdiction under 28 U.S.C. § 1331 as well as jurisdiction to hear suits brought by the United States under 28 U.S.C. § 1345. App. 6-10. The Court further held that the condition in 42 U.S.C. § 300g-3(b)(2) – requiring an appropriate state official to request federal enforcement – did not create an exception to or limit the District Court's jurisdictional authority under §§ 1331 and 1345. Rather, it

> reflects only the limitations on the government's authority to bring this suit. The statute states that the federal government "may bring a civil action" in district court "if" so requested . . . , 42 U.S.C. § 300g-3(b)(2); it says nothing to limit the district court's jurisdiction over such an action if the government was not acting pursuant to an authorized request from the state. We will not assume that Congress intended to deprive the court of subject matter jurisdiction over enforcement of federal laws where Congress has refrained from doing so and where there is no evidence of such intent. Because the SDWA includes no special provision limiting jurisdiction